APPENDIX

APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

Carl Eugene SADLER and Michael Alfred Brandes,

Defendants-Appellants.

No. 72-3797

United States Court of Appeals,

Fifth Circuit

Jan. 17, 1974

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, DYER and GEE, Circuit Judges.

PER CURIAM:

[1] Appellants Sadler and Brandes were tried before a jury in the United States District Court for the Southern District of Florida and found guilty of conspiracy to possess with intent to distribute some 80 pounds of marijuana, in violation of 21 U.S.C. §846. Upon considering their appeal to this court, we find only two contentions which merit comment: (1) that the jury charge on entrapment was improperly phrased in terms of "lawful" and "unlawful" entrapment, and (2) that the court erred in not allowing the defense to introduce evidence in surrebuttal. After deliberating these and other issues not herein

discussed,[1] however, we conclude that their convictions must be upheld.

[2] We recognize that the court below did not heed our warning in United States v. Groessel, 440 F. 2d 602, 607 (5th Cir. 1971), that utilization of such terms as "lawful entrapment" and "unlawful entrapment" may confuse the jury. But we also note that defense counsel failed to call this flaw to the court's attention. Instead he requested a lengthy and somewhat redundant series of instructions which placed undue emphasis on the entrapment defense and which themselves made reference to "unlawful entrapment." Under such circumstances we cannot say that the charge constituted plain error under Rule 52, Federal Rules of Criminal Procedure.

[3, 4] Appellants complain that the trial court erred in allowing the government to put its informer on the stand in "rebuttal" without permitting them to introduce evidence in "surrebuttal" to contradict and impeach his testimony. In order to evaluate this complaint, we begin with the general rule that whether material evidence which could have been received as part of the case in chief should be admitted in rebuttal lies solely within the discretion of the trial court. See *Rodella v. United States,* 286 F. 2d 306, 309 (9th Cir. 1960), and cases cited therein. The court may properly decide that the prosecution should be allowed to rebut testimony by defense witnesses but that it should not be allowed to go into new matter which would prompt a surrebuttal by the defense. Indeed, this

[1] For our response to the argument that the trial court erred in refusing to grant defendants' motion to inspect the grand jury minutes, see our opinion in *United States v. Newcomb,*—F. 2d— (1974), disposing of the appeal of co-conspirators from their separate trial.

seems the most efficient manner of conducting, and terminating, a trial.

[5] Prejudice occurs only if the prosecution witness goes beyond rebuttal and injects fresh issues on which the defendant is denied the right to present evidence. By objection, defense counsel should call to the court's attention that a prosecution witness is going into new material which, if admitted, raises questions of rebuttal by the defense. If prosecution witness steps from the stand, the court may properly require him to point out the new matter covered and show how he intends to refute it. The objective is efficiently to conclude a trial when each side has had the opportunity to present his view of all issues fairly raised.

[6] Here the government refrained from calling the informer who negotiated the deal until his testimony became necessary to rebut the picture painted by the appellants and their two co-defendants when they took the stand. His testimony covered the same course of negotiations as that of the defendants—differing only in his portrayal of their willingness to make the sale.

When defense counsel attempted to put on additional evidence, the trial judge faced a situation very similar to the one analyzed in *Turner v. United States,* 441 F. 2d 736 (Fifth Cir. 1971). There the defendant had presented a vigorous alibi defense maintaining that he was not in the area of the crime when it was committed. The government called two witnesses, the defendant's landlord and a police officer who had seen him, to testify in rebuttal of this contention. The Fifth Circuit upheld the trial court's refusal to allow the defendant back on the stand, stating:

> Appellant admits that it is within a proper exercise of the trial court's discretion to permit a reopening

> of either the government's case or that of the defendant after the other side has rested and relies mainly upon *Dixon v. United States* (5th Cir. 1964), 333 F. 2d 348, and upon 23 C.J.S. Criminal Law §1053, page 1229, to the effect that "where new matter has been introduced by the state in rebuttal of an alibi defense the defendant may rebut the same on surrebuttal". The testimony of the government's rebuttal testimony in this case does not appear to us to be "new". The government had maintained throughout that the Defendant Turner was in Miami during the commission of the offense and the testimony of the two rebuttal witnessses simply goes to corroboration of that fact. In the event defendant had been allowed to take the stand at the surrebuttal he would only have been able to reiterate what he and others had testified to previously and that was to the effect that he had not been in Miami since June 5, 1966.

441 F. 2d at 739. When essentially the same questions arose again recently in *United States v. Doe,* F. 2d (5th Cir. 1973), this court adhered to the reasoning of the *Turner* decision. We do so here as well.

Defense counsel at no time during the informer's testimony objected on the basis of his going into new matter. When, after cross-examining the informer, defense counsel attempted to present more testimony, the court gave him the opportunity to demonstrate why additional evidence was necessary. This he was unable to do. He pointed to no new ground covered by the informer's testimony and gave no indication that his witnesses would do more than reiterate the evidence presented in the case in chief. Now, on appeal, we are told that, given the chance, defendant

would have impeached the informer's testimony by showing that he was a user of narcotics with needle marks on his arm. If this intention had been made known to the trial judge, he might have felt obligated to admit the impeaching evidence. Unfortunately, it was not. In passing we are puzzled why, if the question of the informer's drug use occurred to defense counsel at trial, he did not explore this subject on cross-examination. The court below properly drew the line short of surrebuttal.

Affirmed.

APPENDIX B

UNITED STATES of America, Plaintiff-Appellee,

v.

Steven Paul NEWCOMB and Wayne E. Lucas, Jr.,

Defendants-Appellants

No. 73-1659

**United States Court of Appeals,
Fifth Circuit**

Jan. 17, 1974.

Appeal from the United States District Court of the Southern District of Florida.

Before GODBOLD, DYER and GEE, Circuit Judges.

PER CURIAM:

Appellants Newcomb and Lucas were tried before a jury in the United States District Court for the Southern District of Florida and found guilty of conspiracy to possess with intent to distribute some 80 pounds of marijuana, in violation of 21 U.S.C. §846. We have considered each of the seven points raised on appeal and conclude that, while two merit discussion herein, none requires reversal of their convictions.

[1] Although each appellant took the stand and vigorously denied his participation in the conspiracy charged, both complain that the trial judge erred in refusing to give an entrapment instruction to the jury. Undiscouraged by the general rule in this circuit as stated in Canal Zone v. Risbrook. 454 F. 2d 725 (5th Cir. 1972), and United

States v. Groessel, 440 F. 2d 602 (5th Cir. 1971), that the defense of entrapment is unavailable to one who denies commission of the acts constituting the offense charged, they argue that they fall within the qualification to it expressed in Henderson v. United States, 237 F. 2d 169 (5th Cir. 1956), and Sears v. United States, 343 F. 2d 139 (5th Cir. 1965). The rationale of these latter two cases was explained in McCarty v. United States, 379 F. 2d 285, 286-287 (5th Cir. 1967) as follows:

> In both Sears and Henderson the defendant was indicted for conspiracy and raised the issue of entrapment with regard to a particular overt act. The court held in both cases that the defendant could deny being a party to a conspiracy and yet raise the issue that any overt acts done by him were done because of entrapment. The rationale of these cases was that inconsistencies in defenses in criminal cases are allowable so long as the proof of one does not necessarily disprove the other. Henderson, supra, 237 F. 2d at 173, Sears, supra, 343 F. 2d at 143. In both cases proof that the defendant was not a member of a conspiracy would not have necessarily disproved that he was entrapped into committing a particular overt act. In the instant case, however, proof that McCarty did not commit the acts constituting the sole offense charged necessarily disproves that he was entrapped into doing the offense. We hold this to be too great a degree of inconsistency in defenses to be permitted.

To this construction of the Henderson doctrine we add that the court in Sears emphasized that there the government's own case in chief injected substantial evidence of

entrapment into the case and that, therefore, the defendant was entitled to have the charge adjusted to the evidence. See Sears, supra, 343 F. 2d, at 143.

Here the government's case gave little or no cause for inference that either of these two defendants had been entrapped. Neither defendant's testimony accused the government agents of successfully inducing him to do anything. To the contrary, Newcomb emphatically testified that he consistently refused to secure any marijuana for the undercover agents and was "busted" while totally ignorant that any marijuana transaction was being conducted. Lucas' characterization of his own actions was, if possible, even more exculpatory: he denied that he was even aware that anyone was trying to purchase drugs. His story was that, after renting one car for himself and another for Mr. Newcomb and a friend, he met a girl in whose apartment on the same street as the "stash pad" he stayed for several days, thereby explaining the presence of his car in the vicinity of the crime. He denied that he was the person seen by agents coming and going from the house to which the marijuana was being brought.

The rule expressed in Henderson and Sears requires at the least that a defendant admit to some culpable act which he claims he was entrapped into committing. Here the only acts admitted by appellants were the purely innocuous ones of renting cars, being innocent bystanders in the vicinity of the crime, and (in the case of Newcomb) associating with undercover agents who were interested in purchasing marijuana. A collision of vacuums was thus presented; there was, and could be, no rational claim the government induced, and thereby entrapped, Newcomb or Lucas into performing such unincriminating acts. Appellants' real problem was that the jury chose to believe

the government's evidence that they directly participated in the conspiracy.

[2-4] The only other point on appeal that merits any discussion is defense counsel's contention that his motion to inspect the grand jury minutes should have been granted to enable him to determine whether the indictment was founded upon hearsay or other "incompetent" evidence. In the first place, the Supreme Court has decided, in Costello v. United States, 350 U.S. 359, 76 S. Ct. 406, 100 L. Ed. 397 (1956), that an indictment based exclusively on hearsay evidence is not constitutionally invalid and that a defendant is not entitled to litigate the sufficiency of the evidence presented to the grand jury. See United States v. Klaes, 453 F. 2d 1375 (5th Cir. 1972); United States v. Gower, 447 F. 2d 187 (5th Cir. 1971). Secondly, as we stated in United States v. Cruz, 478 F. 2d 408 (5th Cir. 1973), the "best evidence" rule advanced by some Second Circuit judges[1] serves simply as a supervisory guideline to be employed by courts in determining whether or not the independence and integrity of the grand jury have been impaired. Here there is no indication that the court below abused its discretion in not ordering the grand jury minutes produced for defen-

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[1] This rule would discredit an indictment based on hearsay where (1) nonhearsay evidence is readily available; (2) the grand jury is misled into believing it was hearing direct testimony rather than hearsay; and (3) there is a high probability that had the grand jury heard the eyewitnesses it would not have indicted. See *United States v. Leibowitz*, 420 F.2d 39 (2d Cir. 1969); *United States v. Malofsky*, 388 F.2d 288 (2d Cir. 1968) (dicta); *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966) (dicta). See also dissenting opinions in *United States v. Beltram*, 388 F.2d 449, 451 (2d. Cir. 1968); *United States v. Payton*, 363 F.2d 996, 999 (2d. Cir. 1966).

dants. The trial judge, like this court, was given no reason to suspect that the indictment was ill-founded. Quite to the contrary, it was not even necessary for the grand jurors to rely on hearsay. The government agent in charge of the case testified before the grand jury. There, as at trial, presumably he was able to testify from first-hand information.

Were we to hold that grand jury minutes must be turned over so that defense counsel could satisfy his mere suspicion that the indictment was based on insufficient evidence, grand jury proceedings would effectively be open at the whim of the defense. This we are not disposed to do.

Affirmed.

APPENDIX C

LETTERS TO CLERKS OF FIFTH CIRCUIT COURT OF APPEALS And SUPREME COURT OF THE UNITED STATES

(1) Fifth Circuit Court of Appeals . . .

February 21, 1974

Ms. Carol Lesage and
Mr. Richard Windhorst
United States Court of Appeals
600 Camp Street
New Orleans, Louisiana 70130

Re: No. 72-3797
USA vs. Sadler, et al

No. 73-1659
USA vs. Sadler, Newcomb

Dear Ms. Lesage and Mr. Windhorst:

Thank you for your kind notification that the period for filing a petition for a writ of certiorari had expired in the above-styled case. Everyone in this office, after carefully considering the *Federal Rules of Appellate Procedure, Rule 41 (b),* had concluded that we had 30 days after the Stay of Mandate was issued in which to file our petition for Writ of Certiorari. It is my opinion that such an interpretation of Rule 41 (b) can be reasonably made. Of course, now I am aware of Rule 22.2 of the *Rules of the Supreme Court of the United States.*

Nevertheless, it is this firm's intention to file immediately a petition for Writ of Certiorari with the Supreme Court of the United States. I have been told this day by

Mr. Clark of the Clerk's office that Justice Powell may, at his discretion, consider the petition for presentation to the full court.

Thank you very much for your help and with best wishes, I am,

Very truly yours,

/s/PAUL J. SEWELL

(2) Supreme Court of the United States . . .

February 21, 1974

Clerk, Supreme Court of the United States
United States Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

Attn: Mr. Clark

Re: USA vs Sadler and Brandes, No. 72-3797
USA vs Newcomb and Lucas, No. 73-1650

Dear Mr. Clark:

I am writing to notify your office that this firm intends to file immediately a Petition for Writ of Certiorari in the above-styled case, even though I have been notified by the Clerk of the Fifth Circuit Court of Appeals and by you yesterday by telephone, that the time for filing said Petition expired 30 days after entry of judgment by the Fifth Circuit, or February 16, 1974. I shall, at your direction, address the Petition to Justice Powell, whom you said may consider the Petition at his discretion, even though it is not timely filed.

By way of explanation of our tardiness in filing the Petition for Writ of Certiorari, let me explain the following facts: As background, there were three lawyers handling these two appeals. Two from this office, including myself, and a third, an outside consultant, who actually wrote the briefs and assisted in the preparation of the Motion for Stay of the Issuance of the Mandate. This third lawyer has had much experience in appellate work, both in the State and Federal Courts.

This office received by letter on January 17, 1974, notification from the Clerk of the Fifth Circuit Court of Appeals that judgment, adverse to our clients, had that day been entered in the two cases which we had appealed. The letter from the Clerk, a copy of which is herein enclosed, with some notes of mine added, referred us only to Rules 39, 40 and 41 of the Federal Rules of Appellate Procedure and to Rules 15 and 7 of the Local Rules of the Fifth Circuit.

The three of us went to Rule 41 (b), F.R.A.P., which states:

> "A Stay of the Mandate pending application to the Supreme Court for a Writ of Certiorari may be granted upon Motion, reasonable notice of which shall be given to all parties. The Stay shall not exceed 30 days unless the period is extended for cause shown."

Thereupon, we all concluded that we had 30 days from the date the Stay of Mandate was granted in which to file a Petition for the Writ of Certiorari. The Motion for Stay was filed on February 6, 1974, within the 21-day period before Issuance of the Mandate, as directed in Rule 41

(a), F.R.A.P. In our Motion for Stay, a copy of which is included, in Paragraph 1, we stated that within 30 days we intended to file a Petition for a Writ of Certiorari, then presented the questions we thought required Supreme Court attention.

While we now know that Rule 22.2 of the *Rules of the Supreme Court* requires that the Petition for Writ be filed within 30 days after entry of judgment, we contend that upon reading Rule 41 (b), F.R.A.P., reasonable men can conclude that they have 30 days after a Stay of the Issuance of Mandate is granted within which to file the Petition for a Writ of Certiorari. Rule 41 (b), F.R.A.P., gives no guidance itself as to when the Writ must be filed and says only that a Stay may be granted pending application for a Writ, nor is there any reference to Rule 22.2 of the *Supreme Court Rules.*

I think the confusion is furthered by the third sentence in Rule 41 (b) which states: "If during the period of the Stay there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court that the party who has obtained the Stay has filed a Petition for the Writ in that Court, the Stay shall continue until final disposition by the Supreme Court". This sentence gives the impression that one must obtain the Stay first and then during the 30 day period of the Stay file a Petition for a Writ of Certiorari.

In conclusion, I hope that our clients, whom we have been appointed to represent, are not prejudiced because of our inexperience with the proper procedure to be followed in such a case as this. We believe that our error was based on a reasonable interpretation of Rule 41 (b) F.R.A.P., which interpretation turned out to be incorrect.

It is our further hope that some correction or addition can be made to Rule 41 (b) so that others in the future will not fail to be referred to Rule 22.2, *Supreme Court Rules*, or will not otherwise fail to file their Petition for Writ of Certiorari within 30 days of the date of the entry of judgment by the Court of Appeals, Rule 36 and 41 (a), F.R.A.P.

Very respectfully submitted,

SILVER, ZEVIN, SEWELL & NATIONS

/s/PAUL J. SEWELL
for Murray M. Silver
Counsel for Appellants
and Daniel S. Zevin
(on the Brief)

PJS/jrr

Enc.

cc: Ms. C. Lesage
Mr. R. Windhorst
United States Court of Appeals
New Orleans, La. 70130

APPENDIX D

TITLE 21, SECTION 846, UNITED STATES CODE

§ 846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Oct. 27, 1970, P. L. 91-513, Title II, Part D, § 406, 84 Stat. 1265)

To insure continuity and clarity, Section 841 (a)(1), Title 21, United States Code, is also here included;

Section 841. Prohibited Acts A—Penalties

(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

APPENDIX E

Fourth, Fifth, Sixth and Fourteenth Amendments, U.S.C.

FOURTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FOURTEENTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

RULE 52 (b) FEDERAL RULES OF CRIMINAL PROCEDURE

(b) Plain Error.—Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX G

. . . Under that plea of not guilty, each defendant claims, according to the position taken by the lawyer and the argument that was made to you in summation, that even if the defendant did the things that are charged under the indictment, he is nevertheless not guilty and should be acquitted because he claims that he was unlawfully entrapped.

I charge you that the law recognizes two kinds of entrapment. One kind is lawful entrapment and the other kind is unlawful entrapment.

When a person has no previous intent or purpose to violate the law, but is wrongfully induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law, as a matter of policy, forbids a conviction in a situation like that.

On the other hand, where a person already has the readiness and the willingness to break the law, the mere fact that Government agents provide what appears to be a favorable opportunity is no defense, but that is what we call legal or lawful entrapment; and when I use the words "Government agents" I include the Government informer within the purview of those words.

For instance, when the Government believes that a person wishes to engage in an illegal activity of some kind, it is not necessarily unlawful entrapment for the Government agent directly or through an informer to afford that person an opportunity to commit the illegal act or acts which he is predisposed to commit.

The fact that the Government agent approached the suspects and that the agent was the first to mention the

commission of the illegal act does not, in itself, necessarily make the activities of the agent or the informer an unlawful entrapment.

The decisive question for determination by the jury is whether the defendant in question, at the time he was approached was ready and willing to commit the unlawful act, or whether, on the contrary, the defendant in question, at the time in question, had the normal desire of an honest man to obey the law, and had this desire overcome only through wrongful inducement and persuasion of Government agents or by Government agents.

To state this differently, the conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officers and their agents.

Of course, such conduct is reprehensible and is a defense for an accused in which any unlawful entrapment exists.

On the other hand, law enforcement officers are permitted to engage in conduct involving deception and pretense and other tactics necessary for the detection and the conviction of criminals, provided such tactics are not excessive and do not wrongfully induce an innocent person to commit a crime.

Now, in determining this issue of whether the Government agent in this case acted lawfully or unlawfully, you should consider all the evidence in the case which tends to prove or disprove the readiness of the defendant to commit the alleged act at the time the defendant was approached by the government agent; and this, of course, is another situation where the Government has the burden to prove that what was done was lawfully done rather than unlawfully done.